Supreme Court, U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES

EVELYN O. HOLLEY,

Petitioner,

v.

JESSE BROWN, SECRETARY,
DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNTED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In a Title VII case, can summary judgment be awarded to respondent in a discrimination promotion case (federal employee, prima facie established) on hypothetical subjective criteria without any documented supporting evidence?

2. Are petitioner's privacy rights in a Title VII case violated when the Assistant United States Attorney declines to engage in discovery; discovery closes; Final Pretrial Order and Stipulation submitted; respondent moves for summary judgment; unknown and without the consent of the petitioner, all Equal Employment Opportunity records, in a federal system of records under petitioner's name, are removed from the petitioner's place of employment, and then submitted to the court in support of summary judgment by the respondent?

3. In a Title VII case, when the petitioner lists numerous contested facts, can claims be isolated, and other facts and continuing violation allegations be denied with the only explanation that the claims were handwritten (?), not fully developed, fail to allege a legitimate basis for redress under Title VII, involve previous EEO settled cases, pending cases, and/or were unrelated to the present case, when they involve a continuous pattern by the same party?

4. In a Title VII case, is due process violated when the respondent does not submit the brief in support of summary judgment to the court that was sent to petitioner for her opposition brief response, and only submits his reply brief to the court that significantly changes the previously named discriminating parties?

LIST OF PARTIES

Petitioner Evelyn O. Holley was plaintiff and appellant in the courts below. Respondent Jesse Brown, Secretary, Department of Veterans Affairs, was defendant and appellee in the courts below.

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IN THE SUPREME COURT OF THE UNITED STATES

EVELYN O. HOLLEY,

Petitioner

v.

JESSE BROWN, SECRETARY,
DEPARTMENT OF VETERANS AFFAIRS

Respondent

Petitioner respectfully prays for a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit filed in this proceeding on July 30, 1999.

OPINIONS BELOW

The decision of the Court of Appeals was not reported. It appears in the Appendix hereto [hereinafter "Apx"], Appendix B.
The decision by the District Court for the District of New Jersey was not reported. A copy appears as Apx. D.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was filed on June 4, 1999. (Apx. A). A timely petition for rehearing *en banc* was denied by a divided Court of Appeals on August 27, 1999. (Apx. C). This petition for certiorari is being filed within 90 days of that decision. This Court's jurisdiction is invoked under 28 U.S.C. `1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Code:

Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e et seq.

Equal Pay Act of 1963, as amended, 29 U.S.C. Section 206(d)

Privacy Act of 1974, 5 U.S.C. 552a

5 U.S.C. Section 2301

5 U.S.C. Section 3318

STATEMENT OF THE CASE

1. Proceedings Below

Petitioner Evelyn O. Holley, filed Civil Action No. 96-4822, and Civil Action No. 97-1311, Pro Se, alleging a violation of the Civil Rights Act of 1964, as amended, 42 U.S.C. `2000e et seq. These cases were consolidated in United States District Court/District of New Jersey on March 27, 1997. Petitioner sued Jesse Brown, Secretary, Department of Veterans Affairs alleging discrimination based on sex, reprisal, and harassment based on sex. In an OPINION, dated October 5, 1998, the District Court granted defendant's motion for summary judgment. Petitioner appealed to the Court of Appeals for the Third Circuit, which affirmed the judgment of the District Court.in a MEMORANDUM OPINION on September 30, 1998. Petitioner petitioned to the Third Circuit for rehearing *en banc,* which was denied by a divided Court.

2. Statement of Facts

In January 1985, the petitioner began her employment in the Office of the Director at the East Orange VA Medical Center in East Orange, New Jersey. In 1986 her upper level supervisor was Mr. Peter Baglio, Medical Center Director/EEO Officer. The petitioner filed her first Equal Employment Opportunity (EEO), Agency No. 88-294, complaint, (promotion denial based on sex), in her non-selection for RAM (Resource Allocation Methodology) Coordinator in the Office of the Director in December 1987. A male from outside the facility was selected. This was a VA nationwide centralized position, and the petitioner had been ranked and rated the highest applicant. By VA regulation, Mr. Baglio was the selecting official.

In January 1988, the petitioner then received a lower performance appraisal than the previous year, and file an additional EEO, Agency No. 88-499, complaint based on reprisal. In May 1988, the petitioner was informed that the

performance appraisal would be changed to reflect the same rating as the previous year. She was informed that if she did not sign a settlement agreement, there would be no investigation, and the complaint would be dropped. The petitioner signed a settlement agreement in May 1988.

A VA investigation was then held on the December 1987 complaint. The VA EEO investigator found discrimination. Mr. Baglio, Medical Center Director/EEO Officer, and the upper level supervisor of the petitioner, then requested another EEO investigation. A VA EEO supplementary investigation found discrimination. The petitioner, after being told not to discuss the case with others, was given documents signed by Mr. Baglio. In these settlement documents, full relief was for the petitioner to remain in her previous position with an upgrade. She was not offered the position in which discrimination was found. On July 20, 1988, the petitioner accepted the other offered option of Health Systems Specialist, Staff Assistant, in the office of the Director with the Director as her immediate supervisor. As part of the settlement agreement, the petitioner was also given paperwork that stated that she was a key member of the Director's Office.

The petitioner was then subject to many discriminatory actions. In November 1988, she was still not placed in the Staff Assistant position as per her settlement agreement, and was still in her position in the Quality Management section of the Director's Office, her original 1985 position. When she attempted to gain compliance with her settlement agreement, she was humiliated and insulted, and sought EEO counseling. After this incident, she was transferred to her Staff Assistant position.

Despite being informed she was a key member of the Director's Office as part of the settlement agreement, the petitioner was subject to many discriminatory actions, and sought EEO counseling on six specific incidents. She was kept out of morning report and other meetings where attendance was not denied to males. On March 1990, the Director wrote a negative statement on petitioner's application for the Associate Director Training Program. The Chief of Staff, Dr. Terrence, who came to the facility in January 1989, wrote a letter for

petitioner's Associate Director program application highly praising the petitioner's abilities and outlining programs she had developed.

In July 1990, the petitioner applied for the position of Administrative Assistant/Chief of Staff (AA/COS), Health Systems Specialist, Grade 13, in the Office of the Director. The petitioner had been acting in this position since 1988, and was detailed to this position in June 1990 upon the resignation of the AA/COS, in addition to her regularly assigned responsibilities.

The AA/COS position was a VA nationwide centralized position, and all applications were sent to the VA Central Office in Washington, DC for rating and ranking. Of all the applicants rated and ranked, the petitioner received the highest score. The interviews were conducted only by Dr. Terrence, Chief of Staff, which was a change from other previous position panel interviews in the Office of the Director. The petitioner's interview was held on August 2, 1990, but no interview questions were asked by the Chief of Staff. On August 12, 1990 without any discussion, the petitioner was involuntarily transferred from the Director as her immediate supervisor to the Chief of Staff as her immediate supervisor, and Mr. Baglio listed as her upper level supervisor.

In September 1990, the petitioner was informed that she was not selected for the position of AA/COS, Upon her inquiry to Dr. Terrence for the reason(s) for her non-selection, none was provided. Mr. Popovich, an employee in the VA Regional Office was selected. Mr. Popovich was not ranked or rated; he was an "excepted service" employee, and was not eligible to compete for this competitive merit promotion position. *See* Fiorentino v. United States 607 F.2d 966(1979); Garbacz v. United States 656 F.2d 628 (1981); Com. for Prot. Of First Amend. Rights v. Bergland 434 F. Supp. 318 (1977); Excepted Service Appointments, Chapter 213, Federal Personnel Manual, 1990.

By VA regulation, Mr. Baglio was the final selecting official for this centralized position. No merit promotion regulations and/or principles (5 U.S.C. 2301) were followed, no

matrix was developed, and the Rule of Three (5 U.S.C. 3318) was ignored.

The VA investigative file contains the affidavit of Elodie Murray, section chief in the Managerial and Placement Division in the Office of Personnel and Labor Relations in VA Central Office. She acknowledges that to qualify for the AA/COS position, Mr. Popovich would need one month a year from 1978 to the present in VA Medical Center related duties to meet the one year required specialized experience for the Health Systems Specialist position in question. There is absolutely no indication that Mr. Popovich met this standard, or could achieve such a requirement, even if eligible, as he was not employed by the Medical Center. Opposition Brief, pg. 12, Exhibit 19.

The petitioner filed an EEO, Agency No. 91-165, complaint, Civil Action No. 96-4822, alleging non-selection and pre-selection for the position of AA/COS, and other claims, based on sex, reprisal, and harassment based on sex, on October 30, 1990. In the VA investigation, the petitioner testified, that under Delayed Discovery, she had not been aware that she was injured in 1988 settlement agreements with the agency. In doing research for her testimony, the petitioner became aware that VA EEO regulations stated that an alternate EEO Officer was to have been appointed in her previous EEO complaints as Mr. Baglio was an alleged discriminating official and supervisor of petitioner. Also, retaining the complainant in the same position as before the finding of discrimination cannot be stated as full relief, as presented to her by Mr. Baglio. *See* Lander v. Lujan, Secretary, U.S. Department of the Interior, U.S. Court of Appeals for the D.C. Cir., No. 89-5014, October 27, 1989. The male selected for the position of RAM Coordinator had been upgraded by Mr. Baglio from a Grade 12 to a Grade 14 by July 1990.

The petitioner also included in her complaint the other six issues of harassment based on sex that occurred from 1988 to 1990, and for which she had sought EEO counseling. The EEO Counselor acknowledged that she destroyed her contact notes with the petitioner from 1988 through 1990.
Opposition Brief, pg. 7, Exhibit #11.

The petitioner gave full testimony on each issue in the VA investigation. The discriminatory claims in the Final Pretrial Stipulation and Order in Civil Action No. 96-4822 numbered sixteen. These claims were carefully outlined with all detailed documentation and 287 exhibits in petitioner's Opposition Brief To Defendant's Brief In Support Of A Motion To Dismiss Or For Summary Judgment; Plaintiff's Memorandum of Points, Authorities and Material Facts, [hereinafter known as Opposition Brief.]

See Fuentes v. Perskie, 32 F.3d 765 (3rd Cir. 1994): To show that discrimination was more likely than not a cause for the employer's action, the plaintiff may show previous discrimination by the same employer. *See* Hughes v. Derwinski, 967 F.2d 1174 (7th Cir. 1992): "There is a long standing rule that a plaintiff need not file a second EEOC claim for allegations 'that reasonably related to the first and grow out of such allegations." Jenkins v. Blue Cross Mutual Insurance Inc., 538 F.2d 164,167 (7th Cir.)(en banc), *cert denied,* 429 U.S. 986, 97 S. Ct. 506, 50 L.Ed. 2d 598 (1976).

In her opposition brief, the petitioner submitted the East Orange VA Annual Affirmative Employment Accomplishment Report for Fiscal Year 1990, signed by Mr. Baglio, which revealed a Manifest Imbalance of white females in the Administrative category. Opposition Brief, pg. 11, Exhibit # 18.

The petitioner also submitted statistical information for the facility which revealed that, in indirect patient care in Grades 13/14, in the facility, females were 6% (one black female, not in Director's Office, which was all males), and males 94%. Opposition Brief, pg. 40, Exhibit #65.

Later, upon inquiry under the Freedom of Information Act, the petitioner was informed that the promotion file for the position of AA/COS was destroyed despite the fact that the VA was fully aware of the filing of petitioner's EEO complaint. Opposition Brief, pg. 7, Exhibit #12. *See* Hicks v. Gates Rubber Co., 833 F.2d 1418-1419 (10th Cir. 1987).

On October 21, 1991, the petitioner filed an EEO, Agency No. 92-935, complaint, Civil Action No. 97-1311, based on sex discrimination, reprisal, and harassment based on sex. One of

the claims in this case was the fact that the petitioner was given a Highly Successful performance rating instead of Outstanding rating.

In August 1989, the VA was given a mandate to completely revise the credentialing and privileging (C&P) program for all physicians and dentists at all facilities. The petitioner was told that she may have to assist in this process, but this mandate was to be placed as a VA nationwide critical performance element for all top management employees, which were all males at the East Orange VA. The mandate did not involve the petitioner.

The petitioner then was given full responsibility for this program, that became an overwhelming workload. This was in addition to petitioner's already assigned duties. The years of neglect had resulted in the majority of the 300 physicians with no information and no folders. In the performance year of 1990 to 1991, the petitioner had not only performed her own responsibilities that were overwhelming, but was responsible for meeting all C&P deadlines. During this performance period, the petitioner had also been Acting AA/COS from June to September 1990.

The petitioner stated that she was being rated on her performance as written, and not on her C&P workload, which led to top management officials receiving outstanding ratings for their critical element edict that was done by the petitioner. Additionally, the petitioner had Acting AA/COS responsibilities, plus the August 1990 three year hospital accreditation process in which the Chief of Staff office had multiple compliance requirements. The petitioner had received a Highly Successful rating the previous year without the vast additional workload. She alleged that she did not receive an outstanding because that would add emphasis to her EEO non-selection complaint if she received an outstanding rating during the period of time she was Acting AA/COS. An outstanding rating, in addition to increased compensation, is important for the petitioner that planned to again seek admission to the Associate Director Training Program.

After the filing of the petitioner's EEO complaint in 1990, the environment became even more hostile, and the

Director's office exclusionary policy against the petitioner was very direct. There are additional adverse employment discriminatory claims in petitioner's 1991 EEO complaint that involve Dr. Terrence, bringing the total number of claims in petitioner's Final Pretrial Order and Stipulation for Civil Action No. 97-1311 to fourteen. These claims were all outlined in the petitioner's opposition brief to summary judgment that consisted of 41 single spaced typed pages and 60+ exhibits, some containing direct evidence. The consolidated cases numbered thirty claims.

It is significant for this consolidated case to relate that Mr. Baglio, Medical Center Director, announced his unexpected disability retirement in May 1992. On the Friday this was announced, the petitioner found in her mailbox after 3:30PM, her involuntary reassignment signed by Mr. Baglio, placing her back to her original 1985 placement in Quality Management, but at a lower positioning, in violation of her settlement agreement. No discussion from either the Chief of Staff or the Director had taken place. Her duties of Acting AA/COS, and responsibilities impacting on upward mobility, were removed. At the time of her involuntary reassignment, the petitioner became aware that her occupational code had been lowered from a Health Systems Specialist to a Patient Relations Specialist in December 1991 without her knowledge. This was also in violation of her settlement agreement. The involuntary reassignment occurred prior to petitioner's VA EEO investigation for her complaint in Civil Action No. 97-1311. The petitioner's May 1992 reassignment and lowering of her occupational code are a portion of the claims in pending Civil Action No. 97-5484.

In the stages before the district court filing of Civil Action Nos. 96-4822 and 97-1311, both related complaints were consolidated for an EEOC hearing. The hearing initially was scheduled for 1992, but the VA effectively stalled the process. The EEOC hearing was then scheduled for November 17, 18, 1994. The Medical Center Director, Mr. Mizrach, who replaced Mr. Baglio, had taken many discriminatory adverse employment actions against the petitioner, which are subjects of pending Civil Action Nos. 97-5483 and 99-568. These actions culminated in

the petitioner being terminated from the facility on November 4, 1994. At the EEOC hearing, the EEOC Administrative Judge refused in hear specific claims in Civil Action No. 97-1311, stating there were now moot as the result of the firing of the petitioner.

At the Merit Systems Protection Board pretrial hearing in petitioner's termination appeal, the VA could not produce the required evidence for their actions. The VA rescinded all their actions, and the petitioner was reinstated to federal employment in January 1995. The petitioner's termination and denial of within grade increase are claims in a pending Civil Action No. 98-107. The VA stated in their documents that the petitioner would be returned to employment "status quo ante," but this did not occur, and the many adverse employment actions taken against the petitioner are claims in pending Civil Action No. 98-680, and continue to the present day.

After reinstatement, the petitioner moved for the reinstatement of four claims in Civil Action No. 97-1131 that were not heard by the EEOC administrative judge. The EEOC Supervisory Administrative Judge made a recommended decision, dated October 23, 1996 stating the following: "This Administrative Judge recommends a finding of reprisal regarding the agency's failure to document the complainant's detail to the administrative assistant to the chief of staff position for June 26, 1990 through September 30, 1990. Reasonable attorney fees be awarded since complainant was represented up to the day of the hearing." The VA rejected this finding. Opposition Brief, pg. 27. *See* Plummer v. Western Int'l Hotels Co., 656 F.2d 502, 504, (9th Cir. 1981): We have held that it is reversible error for the district court to exclude an EEOC probable cause determination from a Title VII trial.

Federal Merit Promotion regulations state, that in a selection process, the application must be given credit on the developed matrix, for having previously served in the position of AA/COS. Dr. Terrence testified that no matrix was done.

Another of the petitioner's claims was that she was entitled to a separate performance appraisal rating for the period of time she was Acting AA/COS. This rating would have clearly

shown the incredible performance of the petitioner in the Acting AA/COS position at a time when she was still assuming her other assigned responsibilities. Her entitlement to this separate rating and compensation is clearly stated by the Chief, Personnel Service, Mr. Kowalski, in his testimony. Opposition Brief, pg. 38, Exhibit #62.

One of petitioner's discrimination claims was a violation of the Equal Pay Act (29 U.S.C. Section 206(d)) as petitioner was assigned duties mandated to higher level male employees, in the planning and implementation of the Credentialing and Privileging Program. After all VA mandates were met, two employees were hired to maintain the system put into place by the petitioner.

The petitioner's original EEO complaint files in the consolidated cases are in many large volumes that were submitted in opposition to summary judgment.. All of the petitioner's legitimate claims of adverse employment actions, in the original EEO complaints were typed, but the Court denied numerous claims without explanation. The Court also stated, without explanation, that the plaintiff did not satisfy her claim of a continuing violation theory.

The "continuing violation" theory is a product of federal rulings where a Title VII plaintiff may maintain a "claim for discriminatory conduct that began prior to the filing period if he can demonstrate that the act is part of an ongoing practice or pattern of discrimination. As stated in Berry v. Board of Supervisors of L.S.U. 715 F.2d 971, 979 (5TH Cir.1983), *cert. denied,* 479 U.S. 868, 107 S. Ct. 232, 93 L.Ed. 2d 158 (1986), the plaintiff must demonstrate a "series of related acts, one or more of which falls within" the required time period.

3. Third Circuit Decision

In their Memorandum Opinion, dated July 30, 1999, the Third Circuit affirmed summary judgment on the sex discrimination claim for non-selection of the AA/COS position. The Court states "defendant concedes Holley has established a

prima facie case of discrimination... but Dr. Terrence's preference for an assistant capable of working independently constitutes a non-discriminatory explanation for his hiring decision." Memorandum Opinion at Apx. A-7.

There are no documents or witness testimony as to Mr. Popovich's abilities. Mr. Popovich's last documented education was in 1970, and no later training is submitted. His last performance rating was Fully Successful without comment. The petitioner was a registered nurse with an extensive clinical background, a BS in business administration in 1985, and a Masters of Public Administration with honors in 1990. She received Exceptional ratings from Dr. Terrence in Administration as noted by the Third Circuit in their Memorandum Opinion at Apx. A-4. The petitioner's rating in her application for the AA/COS was the result of her facility wide program accomplishments that dramatically changed processes and the facility's bottom line. She listed exhibits with her extensive documented training in all areas including administration. She was the first person in the East Orange VA Medical Center to receive national certification in quality assurance, which is an enormous asset to the "clinical side" of the hospital for which Dr. Terrence has responsibility.

In his Associate Director Training Program Recommendation, dated April 25, 1990 for the petitioner's application to the program, Dr. Terrence stated the following: "It is with mixed feelings that I recommend Ms. Holley to the Associate Director Program. She has been a tremendous asset to me at this Medical Center, and it will be difficult to replace her with someone of equal capabilities..." "The excellent quality of [program] is a direct tribute to the hospital-wide leadership and responsibility that Ms. Holley has shown in this program...." "Ms. Holley has demonstrated on a number of occasions the ability to make independent decisions as to systems problems and work with individual Service Chiefs to resolve system errors. It is clear from past performance that Ms. Holley is a behind the scenes problem solver, and sometimes is reticent to take the full credit for the accomplishment she has made..." Opposition Brief, pg. 29, Exhibit 43.

In the petitioner's performance appraisal for the period of March 31, 1989 to March 31, 1990, Dr. Terrence stated the following: "...Her expertise in health care management has been a valuable asset to Clinical Service Chiefs in finding problem areas of their services and giving them information for *resolving these problem* areas. Ms. Holley is very adept in both oral and written communication, and has no difficulty getting her point across in meetings and in small groups. .."
Opposition Brief, pg. 29, Exhibit 42.

The Third Circuit stated that Dr. Terrence "wanted to change the responsibilities of his Administrative Assistant." Memorandum Opinion at Apx. A-7. Despite the questioning of the petitioner prior to the interviews that the position description for the AA/COS was 17 years old, and was contrary to VA regulations that states a position description must be current, no current position description was done. In the redescription for the position of AA/COS, naming Mr. Popovich, dated November 8, 1990, there is a slight insignificant change. In the standards given to Mr. Popovich, there is only one slight insignificant change. There was ample opportunity to change the position requirements, and nothing was done. The petitioner submitted this comparative information.
Opposition Brief, pg. 22, Exhibits 30, 31, 32, 33.

The District Court Opinion stated that Dr. Terrence wanted to develop sharing agreements, but the petitioner has exhibits attached to her Final Pretrial Stipulation and Order proving, that in the three years after the appointment of Mr. Popovich, not one sharing agreement was completed.

The Third Circuit stated that Dr. Terrence "had not been satisfied with Manuel's performance" as the previous AA/COS. Memorandum Opinion at Apx. A-3. Mr. Manuel's ineffectiveness is not relevant, however, Mr. Manuel did not like retirement, and came to see Dr. Terrence on more than one occasion to gain reinstatement to federal employment. He was appointed, without competition, as Administrative Assistant to the Chief of Staff at the sister facility, the Lyons∀A Medical Center in Lyons, New Jersey.
Opposition Brief, pg. 30, Exhibit #44.

The Third Circuit stated that "on appeal, Holley argues that because the Central Office assigned her a higher numerical score than Popovich, this indicates she was more qualified for the job." Memorandum Opinion at Apx. A-7. Mr. Popovich was not ranked or rated. Assuming arguendo, that Mr. Popovich was eligible to compete for the AA/COS, VA regulations state that he would have to be ranked and rated to determine the cut off score for the interview process. Petitioner has alleged pre-selection. Opposition Brief, pg. 10-11.

The Third Circuit states "Holley has not called to our attention record evidence of the factors taken into account in assigning the numerical scores." Memorandum Opinion at Apx. A, n.6. This information is unattainable and is not released by VA Central Office.

The only other claim addressed by the Court, out of thirty contested claims put forth, was the lack of an outstanding performance rating given to the petitioner. This discrimination claim is misstated, and is not as limited in its scope as stated by the Court.

The Third Circuit states that she "provided no evidence of a causal link between her earlier EEOC complaints and Dr. Terrence's decision." Memorandum Opinion at Apx. A-8. Dr. Terrence was aware of the petitioner's previous EEO complaints with the agency, and the petitioner had discussions with him even prior to seeking EEO counseling. Mr. Manual, previous AA/COS, is listed as a witness, in a long line of named witnesses, because he told the petitioner that he had informed Dr. Terrence about the petitioner's "EEO problems" when he first arrived on station in 1989.

In many of the petitioner's discrimination claims in both consolidated cases, and occurring prior to the selection of the AA/COS position, Dr. Terrence was directly involved. His participation is clearly documented in the petitioner's affidavit submitted by the respondent, and in extensive documentation and exhibits in the petitioner's opposition brief, with Dr. Terrence even more involved in Civil Action No. 97-1311.

See McKenzie v. Sawyer, 684 F.2d 62, 67 (D.C. Cir. 1982): "The factual disputes involved in most Title VII suits preclude their resolution on summary judgment.

The Third Circuit stated that "it is possible that temporal proximity between the protected activity and the adverse employment decision 'is sufficient to establish a causal link' for Title VII purposes. Woodson, 109 F..3d at 920.7" At n.7, they stated that they "cannot tell from the record when Holley filed her earlier EEOC complaints."

See Woodson, v. Scott Paper Co., 109 F.3d 920-923 (3rd Cir.) cert denied, 118 S. Ct. 299 (1997): With evidence taken as a whole, a plaintiff can establish a link between his or her protected behavior and adverse employment actions if the employer engaged in a pattern of antagonistic behavior in the intervening period.

REASONS FOR GRANTING THE WRIT

I. The Court should decide if summary judgment can be granted in a Title VII, federal employment case, when the respondent, after conceding prima facie, only presents hypothetical subjective criteria?

Ms. HOLLEY: Mr. Gibbons has not given any legitimate nondiscriminatory reasons. First of all, we have the idea that they destroyed the evidence of the promotion file. So they can say anything they want, your Honor. The fact of the matter is, this is a very closed type of a promotion selection process. It's supposed to go just according to the guideline. To say he just wanted to change the way things were done is not a legitimate nondiscriminatory reason for not selecting. You can't do that. It must be based on legitimate selection factors, objective standards, uniformly applied, consistency in effect, and job related.

(Oral Argument Transcript, September 21, 1998, pg. 13-14)

See Keller v. Orix Credit Alliance Inc., 130 F.3d 1108 (3rd Cir. 1997)(en banc): Any subjective analysis of the

employee's job performance is properly examined at the pretext stage of the litigation. Id.; Weldon, 896 F.2d at 789. Even arguably quantifiable measures such as "productivity" and "output" can constitute a "subjective determination by [the defendant] of the performance level [plaintiff] had to achieve." Weldon, 896 F.2d at 799. We rely upon objective factors alone because subjective evaluations "are more susceptible of abuse and more likely to mask pretext." Id at 789 (citing Fowle v. C&C Cola, 896 F.2d 59, 64-65 (3rd Cir. 1989).

See Moore v. Hughes Helicopters, Inc. 708 F.2d 475, 481 (9th Cir. 1983); Payne v. Travenol Laboratories, Inc., 673 F. 2d 798, 824 (5th Cir. 1982) cert. denied, 459 U.S. 1038 (1983); Nanty v. Barrows Co., 660 F.2d 1327, 1334 (9th Cir. 1981). Subjectivity is often a convenient pretext for discriminatory practices.

See Brown v. Gaston Co. Dyeing Machine Co., 457 F.2d 1377, 1382 (4th Cir. 1972); United States v. Bethelem Steel Corp., 446 F.2d 652, 655 (2nd Cir. 1972). The failure to establish "fixed or reasonably objective standards and procedures for hiring "is a discriminatory practice.

11. The Court should decide if the petitioner rights are violated in a Title VII civil action, when the respondent declines discovery, and then removes petitioner's records from a federal system of records, and submits for summary judgment?

See Title 5. U.S.C., Section 552a, Records maintained on individuals; (d)(5) Access to Records – nothing in this section shall allow an individual access to any information compiled in reasonable anticipation of a civil action or proceeding.

Ms.. HOLLEY: One of the things that I wanted to bring up was that ...discovery closed...October 31st, and Mr. Gibbons...he didn't even mail his things to me included in the final pretrial stipulation and order until November 3rd. And I had called him on September 9th to set up a meeting to discuss discovery and he

told me there was no reason to meet and I should just submit my copy of the final pretrial stipulation and order.

THE COURT: Why are we discussing that now when we're at summary judgment?

MS. HOLLEY: Because, you Honor, I think this broke the Privacy Act. I had no idea that these eight volumes were given to Mr. Gibbons. I had no idea until I received them. I mean, those eight volumes were under a system of records under my name.

THE COURT: What's in front of me now has nothing to do with the Privacy Act.

MS. HOLLEY: Well, I think it does, you Honor.

I think that the fact that these were all given to him without my knowledge—after discovery was closed I found out that they had them all. He wasn't interested in discovery, which was fine with me, but the idea that now he's using the very documents that he said—he objected to my using preliminary affidavits and affidavits in the administrative and investigative file as hearsay. Then, when he comes down, he says that the- –he has submitted 1400 pages of testimony, affidavits and supporting documentation that demonstrates that no genuine issue of material fact exists and defendants are, therefore, entitled to summary judgment. This is the very documentation that he called hearsay... It's very prejudicial to me. I mean, I just don't understand how this can happen.

(Oral Argument Transcript, September 21, 1998, pg.25-27)

Several courts have stated that the first element a plaintiff must prove in a wrongful disclosure suit under the Privacy Act is that the information is a record within a system of records. There is no question that the petitioner's own Equal Employment Opportunity (EEO) records, the VA investigation records, and Equal Employment Opportunity Commission (EEOC) records were in a system of record bearing the petitioner's name and other identifying characteristics. The Ninth Circuit, Wilborn v. HHS, 49 F.3d 597, 600-02 (9th Cir. 1995) recently held that "independent knowledge,' gained by the creation of records, cannot be used to sidestep the Privacy Act."

III. The Court should decide if petitioner's contested allegations in a Title VII case can be denied by the Court with explanation that the claims were handwritten(?), not fully developed, failed to allege a legitimate basis for redress, and were unrelated to the present case when discriminatory actions involve a continuous pattern by the same party?

See Conley v. Gibson, 355 U.S. 41,45-46, 48 78 S. Ct. 102-103 L.Ed.2d 80 (1957): In appraising the sufficiency of the complaint, we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. The Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is "a short and plain statement of the claim "that will give the defendant fair notice of what the plaintiff's claim is and the ground upon which it rests. Cf. Maty v. Grassell Chemical Co., 303 U.S. 197, 58 S.Ct. 5097, 83 L.Ed. 745.

See West v. Philadelphia Elec. Co., 45 F.3d 744 (3rd Cir. 1995): We find that the District Court was overly restrictive in its determinations of admissibility and that the challenged evidentiary exclusions were erroneous in that they deprived West of the opportunity to present his full case to the jury.

IV. The Court should decide whether due process is violated when, the respondent sends his brief for summary judgment to the petitioner; the petitioner is directed by the Court to send her opposition brief to the respondent; the respondent submits petitioner's brief, and only his reply brief to the Court; and, in his reply brief changes his previously named discriminatory party?

See Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982); Little v. Streator, 452 U.S. 1 (1981); Armstrong v. Manzo, 380 U.S. 545 (1965). The right of access to the court and the "meaningful hearing" requirement of due process was denied to the petitioner. "Due process" requires a meaningful opportunity to be heard, granted at a meaningful time, and in a meaningful manner.

The proposed Final Pretrial Order was entered on the docket November 10, 1997. At a status conference on November 17, 1997, the District Court Judge placed on the docket that moving papers were to be exchanged by the parties by 1-16-1998, with opposition by 2-13-98. Reply papers by 2-20-98, and summary judgment motion to be filed by 2-20-98.

In Appellant's Motion In Opposition to Motion Of Appellee To File a Supplemental Appendix And For Additional Time To Submit The Supplemental Appendix and Brief In Of Appellee, sent to the Third Circuit on December 21, 1998, the petitioner stated the following: "In correspondence received by the appellant on February 21, 1998, appellant received defendant's Reply Brief in Support Of A Motion To Dismiss Or For Summary Judgment. The defendant's reply brief was his only submission to the court, and he included 'one box addressed to Judge Greenaway containing submissions of the plaintiff pro se in opposition.' Appellant was troubled by the fact that the defendant's brief that she answered was not included in the procedure as outlined by Judge Greenaway. Defendant's reply brief was very different from the brief presented to the appellant. It did not appear that due process was served."

In oral argument on September 21, 1998, the following was stated:

The Court: Ms. Holley, do you have a presentation prepared?

Ms. Holley: I do, your Honor.

The Court: We're going to make it really short. We're going to have you answer my questions. That will be the best presentation you can make. Oral Argument Transcript, pg. 2.

4. Conclusion

See Celotex Corp. v. Catrett, 106 S. Ct. 2555 (1986): Judge White concurring: The movant must discharge the burden the Rules have placed upon him: It is not enough to move for summary judgment without supporting the motion in any way or with a conclusory assertion that the plaintiff has not evidence to prove his case. Petitioner Celotex does not dispute that if respondent has named a witness to support her claim, summary judgment should not be granted without Celotex somehow showing that the named witness' possible testimony raises no genuine issue of material fact.

See Lynn v. Deaconess Med. Center – West Campus, 160 F.3d 484, 486-487 (8th Cir. 1998) In reviewing employment discrimination claims, we keep in mind the caution that summary judgment should seldom be used in discrimination cases. (See Crawford v. Runyon, 37 F.3d 1338, 1341 (8th Cir. 1994). Because such cases often depend on inferences rather than on direct evidence, summary judgment should not be granted unless the evidence could not support any reasonable inference for the nonmovant.

See Robinson v. PPG Indus. Inc. 23 F.3d 1159, 1162 (7th Cir. 1994) "This standard is applied with added rigor in employment discrimination cases, where intent and credibility are crucial issues."

The petition for a writ of certiorari should be granted.

Respectfully submitted.

EVELYN O. HOLLEY, Pro Se

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 98-6370

EVELYN O. HOLLEY

v.

JESSE BROWN, SECRETARY,
DEPARTMENT OF VETERAN AFFAIRS

(Newark Civil No. 96-4822)

EVELYN O. HOLLEY

v.

JESSE BROWN, SECRETARY,
DEPARTMENT OF VETERAN AFFAIRS

(Newark Civil No. 97-1131)

Evelyn O. Holley, Appellant

On Appeal from the United States District Court
for the District of New Jersey
D.C. Civil Action Nos. 96-cv-04822 & 97-cv-01131)
(Honorable Joseph A. Greenaway, Jr.)

Apx. A

Submitted Pursuant to Third Circuit LAR 34.1(a)
June 4, 1999

Before: SCIRICA and McKEE, Circuit Judges,
and SCHWARZER, District Judge*

JUDGMENT

This cause came to be considered on the record from the United States District Court for the District of New Jersey and was submitted pursuant to Third Circuit LAR 34.1(a) on June 4, 1999. On consideration whereof, it is now hereby

ORDERED and ADJUDGED by this court that the judgment of the District Court entered September 30, 1998, be, and the same is hereby affirmed.

Costs taxed against appellant.

ATTEST:

/s/
P. Douglas Sisk, Clerk

DATED: JUL 30 1999

*The Honorable William W Schwarzer, United States District Judge for the Northern District of California, sitting by designation.

UNREPORTED - NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 98-6370

EVELYN O. HOLLEY

v.

JESSE BROWN, SECRETARY,
DEPARTMENT OF VETERAN AFFAIRS

(Newark Civil No. 96-4822)

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(Honorable Joseph A. Greenaway, Jr.)

Apx. B

Submitted Pursuant to Third Circuit LAR 34.1(a)
June 4,1999

Before: SCIRICA and McKEE, Circuit Judges,
and SCHWARZER, District Judge*

(Filed JUL 30 1999)

MEMORANDUM OPINION

SCIRICA, Circuit Judge.

This is an appeal from a grant of summary judgment in favor of defendant Jesse Brown, Secretary of the Department of Veterans Affairs, in a discrimination claim alleging violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. §§ 2000e to 2000e-17 (West 1994). Appellant, Evelyn Holley, claims the Central Office discriminated against her because of her gender and in retaliation for her prior complaints of gender discrimination to the Equal Employment Opportunity Commission. Specifically, Holley contends that for unlawful discriminatory reasons, she was not selected for the position of Administrative Assistant to the Chief of Staff and was given an appraisal rating of "Highly Successful" rather than "Outstanding" for the period April 1, 1990 through March 31, 1991. We will affirm.

*The Honorable William W Schwarzer, United States District Judge for the Northern District of California, sitting by designation.

On Jan. 4, 1989, Dr. Christopher Terrence became Chief of Staff at the Veterans Administration Medical Center in East Orange, New Jersey. Evelyn Holley, was at that time a Patient Representative at the center.[1] Shortly after Dr. Terrence arrived, his Administrative Assistant, Fred Manuel, announced his retirement. Dr. Terrence represented that he had not been satisfied with Manuel's performance and wanted an Administrative Assistant who could independently handle the day-to-day operations of the office, allowing him (Dr. Terrence) to focus on policy matters. The Central Office of the Department of Veterans Affairs selected a candidate pool, including both Holley and John Popovitch, formerly an attorney with the Department of Veterans Affairs.[2] Dr. Terrence interviewed all the candidates and selected Popovitch in August 1990. Based on the interviews and his personal experience with Holley, Dr. Terrence represented that he believed Popovitch was most capable of all the candidates of working independently.[3]

On August 2, 1991, Dr. Terrence prepared Holley's annual performance appraisal for the period April 1990 to March 1991. The possible appraisal levels, in descending order, are Outstanding, Highly Successful, Fully Successful, Minimally Successful, and Unacceptable. In the appraisal, Dr. Terrence rated Holley in the areas of, inter alia, Interpersonal Relationships, Information Management, Quality Assurance, and Administration. The available ratings for these individual areas were Exceptional, Fully Successful, and Less than Fully Successful. To obtain an Outstanding appraisal, it was necessary to be rated Exceptional in

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[1]In her brief on appeal, Holley asserts that her correct job title was Health Systems Specialist.

[2]In her brief, Holley asserts, without citation to the record, that the Central Office rated each applicant's qualifications on a numerical scale and that Holley's score was the highest among the applicants for the position.

[3]For most of the period between Manuel's retirement and Popovitch's start date, Holley was Dr. Terrence's acting Administrative Assistant.

all four areas. Dr. Terrence rated Holley as Exceptional in the areas of Interpersonal Relationships and Administration and Fully Successful in the areas of Information Management and Quality Assurance. Based on these ratings, Holley receive a Highly Successful appraisal. Twice previously, Dr. Terrence had appraised Holley, both times as Highly Successful, appraisals she does not challenge here.

Before Dr. Terrence selected his new Administrative Assistant or performed Holley's 1990/91 appraisal, Holley had filed EEOC complaints not before us here. Dr. Terrence testified that he was not aware of these complaints when he hired Popovitch or appraised Holley. After Holley was not hired as Administrative Assistant and was given her appraisal, she timely filed additional EEOC complaints of gender discrimination and retaliation. Thereafter Holley filed suit under Title VII, charging the Center's decisions not to promote her and not to give her an Outstanding appraisal were made on the basis of gender and in retaliation for her earlier EEOC complaints.[4]

The District Court entered summary judgment for defendants, holding (1) Holley offered no evidence that the Department of Veterans Affairs' proffered non-discriminatory reason for selecting Popovitch as Administrative Assistant to the Chief of Staff was a pretext for discrimination, (2) Holley offered no evidence that the Chief of Staff was aware of her prior EEOC complaints, and (3) receipt of a "Highly Successful" appraisal rating was not an adverse employment decision. See Holley v. Brown, 96-CV-4822, typescript op. at 7-17 (D.N.J. Sept. 30, 1998). Holley now appeals.[5]

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[4]The District court indicated that Holley made other claims in her briefs that had not been included in her complaint. See Holley v. Brown, 96-CV-4822, typescript op. at 5 n.3 (D.N.J. Sept. 30, 1998).

[5]The District Court had original jurisdiction over the federal question. See 28 U.S.C.A. § 1331 (West 1993). We have appellate jurisdiction over the final judgment. See 28 U.S.C.A. § 1291 (West 1993). Our review is de novo. See Brader v. Allegheny General Hospital, 167 F.3d 832, 839 (3d Cir. 1999). Summary judgment is granted if, viewing all the evidence in the light most favorable to the non-moving party and drawing all plausible inferences in her favor, no reasonable jury could find for her. See Sameric Corp. v. City of Phila., 142 F.3d 582, 590 (3d Cir. 1998).

A Title VII plaintiff without direct evidence of invidious intent may rely on the burden-shifting analysis established in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). See Smith v. Borough of Wilkinsburg, 147 F.3d 272, 278 (3d Cir. 1998); Gavalik v. Continental Can Co., 812 F.2d 834, 853 (3d Cir. 1987). Initially, the plaintiff must establish a prima facie case. A prima facie case of discrimination requires proof that the plaintiff is a member of a protected class, that she was qualified for an employment benefit, and that she did not receive the benefit (or suffered an adverse employment decision) in circumstances suggesting discrimination, i.e., the benefit was given to a person who was not a member of the protected class. See Waldron v. SL Indus., Inc., 56 F.3d 491,494 & n.3 (3d Cir. 1995). To establish aprima facie case of retaliation, the plaintiff must show that she was engaged in a protected activity, that she suffered an adverse employment action, and that there was a causal link between the protected activity and the adverse action. See Woodson v. Scott Paper Co., 109 F.3d 913, 920 (3d Cir. 1997). If the plaintiff makes a prima facie case, the employer must provide a non-discriminatory reason for the adverse employment action. See Sheridan v. E.I. DuPont de Nemours and Co., 100 F.3d 1061, 1066 (3d Cir. 1996) (en banc). If the employer does so, the plaintiff must prove that the proffered explanation is mere pretext, and that the true motivation for the employer's action was discriminatory or retaliatory. See Waldron, 56 F.3d at 494. To survive summary judgment, a plaintiff need not present affirmative evidence of discrimination or retaliation, only "cast sufficient doubt upon the employer's proffered reasons to permit a reasonable factfinder to conclude that the reasons are incredible . . ." Sheridan, 100 F.3d at 1072.

> To discredit the employer's proffered reason, however, the plaintiff cannot simply show that the employer's decision was wrong or mistaken, since the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent, or competent. Rather, the non-moving plaintiff

> must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence ....

Fuentes v. Perskie, 32 F.3d 759, 765 (3d Cir. 1994) (internal citations and quotation marks omitted).

a.

Defendant concedes Holley has established a prima facie case of discrimination in the failure to promote her to Administrative Assistant to the Chief of Staff: she is a woman and was qualified for the position, and the promotion went to a man. But Dr. Terrence's preference for an assistant capable of working independently constitutes a non-discriminatory explanation for his hiring decision. Dr. Terrence made his selection based on his interviews of the candidates, their work histories, and his own experience working with Holley. On appeal, Holley argues that because the Central Office assigned her a higher numerical score than Popovitch this indicates she was more qualified for the job.[6] But the Central Office only selected a pool of candidates; the final decision was Dr. Terrence's. Dr. Terrence testified that he wanted to change the responsibilities of his Administrative Assistant and therefore sought a person with different qualifications than those that had traditionally been relevant in the position. As noted, it is not the job of the courts to determine whether an employer's hiring criteria are wise, only whether they are discriminatory. An emphasis on the ability to work independently is not discriminatory, and there is no evidence here that Dr. Terrence made his decision on any other basis.

We are not confident that Holley established a prima facie case of retaliation in the failure to promote her because she has provided

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[6]Holley has not called to our attention record evidence of the factors taken into account in assigning the numerical scores, nor have we found any.

no evidence of a causal link between her earlier EEOC complaints and Dr. Terrence's decision. We note Dr. Terrence's uncontradicted testimony that he was not aware of the EEOC complaints. It is possible that temporal proximity between the protected activity and the adverse employment decision "is sufficient to establish a causal link" for Title VII purposes. Woodson, 109 F.3d at 920.[7] Assuming arguendo that Holley has made a prima facie case, the non-discriminatory rationale discussed supra is sufficient to meet defendant's burden of production. As noted, Holley presented no evidence that this explanation was pretextual.

b.

The District Court ruled that Holley had not proven a prima facie case that her "Highly Successful" appraisal was discriminatory or given in retaliation for her earlier EEOC complaints. See Holley, 96-CV-4822, typescript op. at 13-14, 16-17. We agree. First, Holley has not called our attention to any evidence in the record that she deserved a rating of Exceptional in the areas of Information Management and Quality Assurance. Without such ratings, she was not eligible for an Outstanding appraisal. We note that Holley has not challenged the two prior Highly Successful appraisals she received from Dr. Terrence. Second, a Highly Successful appraisal is not an adverse employment decision. As we recently explained in Robinson v. City of Pittsburgh, 120 F.3d 1286 (3d Cir. 1997),

> Retaliatory conduct other than discharge or refusal to rehire is thus proscribed by Title VII only if it alters the employee's compensation, terms, conditions, or privileges of employment, deprives him or her of employment opportunities, or adversely affects his or her status as an employee. It follows that not everything that makes an employee unhappy qualifies as retaliation, for otherwise, minor and even trivial employment actions that an irritable,

[7] We cannot tell from the record when Holley filed her earlier EEOC complaints.

chip-on-the-shoulder employee did not like would form the basis of a discrimination suit.

Id. at 1300 (internal quotation marks and alterations omitted). Holley has presented no evidence that she lost any tangible employment benefit as a result of her Highly Successful appraisal.

3.

For the reasons given, we will affirm the grant of summary judgment.

TO THE CLERK:

Please file the foregoing opinion.

/s/
Circuit Judge

DATED: JUL 30 1999

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 98-6370

EVELYN O. HOLLEY
v.
JESSE BROWN, SECRETARY,
DEPARTMENT OF VETERAN AFFAIRS

(Newark Civil No. 96-4822)

EVELYN O. HOLLEY
v.
JESSE BROWN, SECRETARY,
DEPARTMENT OF VETERAN AFFAIRS

(Newark Civil No. 97-1131)

Evelyn O. Holley, Appellant

(D.C. Civ. Nos. 96-cv-04822 & 97-cv-01131)

SUR PETITION FOR REHEARING

Present: BECKER, Chief Judge,
SLOVITER, MANSMANN, GREENBERG, SCIRICA,
NYGAARD, ROTH, McKEE and RENDELL, Circuit Judges,
and SCHWARZER*, District Judge

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*The Honorable William W Schwarzer, United States District Judge for the Northern District of California, who sat by designation, as to panel rehearing only.

Apx. C

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court in banc, is denied.

BY THE COURT,

/s/
Circuit Judge

Dated: AUG 27 1999

ORIGINAL FILED
OCT 05 1998
WILLIAM T. WALSH, CLERK

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Evelyn Holley, Pro Se,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Civ. No. 96-4822 (JAG)
	:	
Jesse Brown, Secretary of the Department of Veterans Affairs,	:	**OPINION**
	:	
Defendant	:	
	:	

GREENAWAY, JR., District Judge,

This matter comes before the Court on a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), or, in the alternative, for summary judgment pursuant to Fed. R. Civ. P. 56(c), by Daniel Gibbons, Assistant U.S. Attorney, on behalf of Defendant Jesse Brown, Secretary of the Department of Veterans Affairs. Plaintiff, Evelyn Holley,[1] is a Patient Representative at the Veterans Administration Medical Center in East Orange, New Jersey (the "VA Medical Center"). Plaintiff claims that she was discriminated against because of her gender and subjected to reprisal based on her previous filing of claims with the Equal Employment Opportunity Commission (the "E.E.O.C."). Specifically, Plaintiff

[1]Plaintiff appears in this case pro se.

Apx. 1 D

claims that: (1) gender discrimination; and (2) reprisal were the reasons that (a) she was not selected for the position of Administrative Assistant to the Chief of Staff ("AA/COS") (the "Non-Selection Action"); and (b) she was given an appraisal rating of "Highly Successful" rather than "Outstanding" for the period April 1, 1990 through March 31, 1991 (the "Appraisal Action"). Plaintiff filed two complaints with the E.E.O.C. based on these actions (Agency Nos. 91-165, filed October 30, 1990, and 92-935, filed October 21, 1991) which resulted in unfavorable decisions. Plaintiff filed two lawsuits in this court (Civ. Nos. 96-4822 and 97-1131) which were consolidated into this action. Plaintiff's two complaints allege a violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C.A. § 2000e et seq. (West 1998). The Court heard oral argument on the motion on September 21, 1998. Based on the reasoning set forth herein, Defendant's motion for summary judgment as to Plaintiff's two complaints shall be granted.[2]

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[2]Plaintiff's handwritten complaints for 96-4822 and 97-1131 are somewhat difficult to decipher. As best as this Court can determine, Plaintiff has four basic claims embodied in her two complaints: (1) she was not selected as AA/COS because of gender discrimination; (2) she was not selected as AA/COS because of reprisal; (3) she was given an appraisal rating of "Highly Successful" rather than "Outstanding" for the period April 1, 1990 through March 31, 1991 because of gender discrimination; and (4) she was given an appraisal rating of "Highly Successful" rather than "Outstanding" for the period April 1, 1990 through March 31, 1991 because of reprisal. The Court notes that Plaintiff's complaints make reference to previously settled claims and other pending cases, as well as unresolved E.E.O.C. actions. Plaintiff suggests in her papers that these alleged violations, outside of the pleadings here, satisfy the continuing violations theory. Plaintiff cannot satisfy the requirements of the continuing violations theory. Although there is no definite standard for what constitutes a continuing violation, the Plaintiff must demonstrate more than a series of discriminatory acts. See Huckabay v. Moore; 142 F.3d 233, 239 (5th Cir. 1998). She must show that an organized scheme exists leading to and including a present violation, (citation omitted), such that it is the cumulative effect of the discriminatory practice, instead of any discrete occurrence, that gives rise to the cause of action. Id. (citations omitted). Plaintiff sets forth no allegations to support the application of the continuing violations theory here.

FACTS

On January 4, 1989, Dr. Christopher Terrence ("Dr. Terrence") assumed the Chief of Staff position at the VA Medical Center. Soon after, Mr. Fred Manuel, the AA/COS announced his retirement. The administration initiated a search for a replacement. During the summer of 1990, Dr. Terrence interviewed several candidates for the AA/COS position. The Department of Veterans Affairs Central Of fice selected the candidate pool which included Plaintiff and Mr. John Popovitch. During the period following Mr. Manuel's retirement, but before Mr. Popovitch's installation, Plaintiff served as Acting AA/COS for most, if not all, of this period. The AA/COS position is a Centralized Staffing Position, meaning that it was posted nationwide and a large group of individuals applied. Candidates applied directly to the Central Office in Washington, D.C. (the "Central Of fice") which issued a "Register" of the names of the ten most qualified candidates.

Dr. Terrence completed interviewing applicants supplied on the Register in mid-August 1990. Dr. Terrence selected Mr. Popovitch for the AA/COS position and according to procedure, both his Station Director, Mr. Peter Baglio and the Central Office signed off on his choice. On or about September 9, 1990, Dr. Terrence informed Plaintiff that he had selected Mr. Popovitch. Plaintiff met with an Equal Employment Opportunity Counselor on September 21, 1990 and alleged that her non-selection was discriminatory based on gender and reprisal for her filing of earlier E.E.O.C. complaints. On October 1, 1990, Mr. Popovitch assumed his new position. On October 30, 1990, Plaintiff filed a formal complaint with the E.E.O.C. regarding this matter.

On August 2, 1991, one year later, Plaintiff received a rating of "Highly Successful" in her annual performance appraisal for the 1990-1991 year. Dr. Terrence prepared her appraisal. This is the same rating that she received on her two previous reviews which Dr. Terrence also prepared. Interestingly, Plaintiff does not contest the two previous review ratings. The relevant appraisal form had five "Overall Rating" categories: (1) Outstanding; (2) Highly Successful; (3) Fully Successful; (4) Minimally Successful; and (5) Unacceptable. According to the form, an "Outstanding" overall

rating is appropriate when "Achievement categories for all four elements are designated as Exceptional." A "Highly Successful" overall rating is appropriate when "Achievement levels for all critical elements are designated as Exceptional. Achievement levels for non-critical elements are designated as at least Fully Successful. Some, but not all, non-critical elements may be designated as Exceptional." The four relevant critical elements are: (1) Interpersonal Relationship; (2) Information Management; (3) Quality Assurance; and (4) Administrative. Plaintiff received an "Exceptional" rating in the Interpersonal Relationship and Administrative critical element categories and a "Fully Successful" rating in the Information Management and Quality Assurance critical element categories. Accordingly, the result was an overall rating of "Highly Successful".

Plaintiff alleged that her 1990-1991 Performance Appraisal warranted an "Outstanding" appraisal because she deserved an "Exceptional" rating in all four critical element categories. Dr. Terrence determined that Plaintiff deserved an "Exceptional" rating in only two critical element categories. On August 8, 1991, Plaintiff again contacted an Equal Employment Opportunity Counselor alleging that Dr. Terrence failed to give her an "Outstanding" performance appraisal because of gender bias and/or as retaliation for Plaintiff previously filing E.E.O.C. complaints. Dr. Terrence claims that he has no knowledge of the previous E.E.O.C. complaints against the VA Medical Center because such records are kept confidential. Plaintiff has no evidence regarding Dr. Terrence's knowledge of her complaints but she asserts in her brief that Mr. Manuel (the prior AA/COS) told her that he shared the information with Dr. Terrence. There is no affidavit, certification or deposition by Mr. Manuel attesting to this fact. On October 21, 1991, Plaintiff filed a formal complaint with the E.E.O.C. alleging discriminatory animus regarding her 1990-91 performance appraisal.

Plaintiff has filed numerous discriminatory complaints against officials at the VA Medical Center, many of which are not relevant here. This Opinion is limited to her claims that: (1) gender discrimination; and (2) reprisal were the reasons that: (a) she was not selected to the position of AA/COS; and (b) not

given an "Outstanding" review rating for the period April 1, 1990 through March 31, 1991.[3]

Plaintiff filed two complaints with the E.E.O.C. based on these actions (Agency Nos. 91-165 and 92-935); each resulted in an unfavorable result. The two Equal Employment Opportunity Investigative Report and Recommendations, issued March 20, 1991 and July 13, 1992, respectively, found no credible evidence of discriminatory conduct (gender or reprisal) against Plaintiff by Defendant.[4]

Subsequently, Plaintiff filed two lawsuits in this court regarding these matters (Civ. Nos. 96-4822 and 97-1131), which were consolidated into the instant action. The Court heard oral argument on Defendant's motion on September 21, 1998.

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[3]Plaintiff makes several other claims in her responsive papers that are not properly before this Court based on the complaints in the consolidated action. These claims, as they appear in Plaintiff's responsive papers are not fully developed, involve previously settled or other pending cases and/or fail to allege a legitimate basis for redress under Title VII. These additional claims are that Plaintiff: (1) suffered humiliation and discrimination when she was not notified that another employee would be assigned as Acting AA/COS while Mr. Popovitch was on leave on two separate occasions; (2) possessed an actual right to placement in the position of Acting AA/COS while Mr. Popovitch was on leave; (3) felt excluded from the loop of communication in the Director's office; and (4) failed to be "reminded" of Mr. Popovitch's vacation. Plaintiff's claims related to her not being placed in the Associate Directors program are also unrelated to the allegations in the consolidated complaints and this Court shall not address or decide these matters.

[4]Contrary to Plaintiff's claims in oral argument, the report did not "find discrimination". Specifically, the March 20, 1991 report stated that:

> There are difficulties at the station which may have exacerbated this current situation. Especially of note is the large number of white male managers which may effectively create a situation of isolation for an individual such as Ms. Holley, who would not then have an effective role model . . .The atmosphere created in a male dominated environment may be a failure to thrive for non-males. The preponderance of evidence fails to support the complaint as to non-selection due to sex (female) for the position AA/COS; nor was her non-selection for this position the result of her filing of past complaints.

DISCUSSION

Standards for Motion to Dismiss and Summary Judgment

Complaints may be dismissed when a Plaintiff fails to state a claim upon which relief may be granted. Fed. R. Civ. P. 12(b)(6). In reaching this determination, Courts are limited to the facts as stated in the complaint. See Hauptmann v. Wilentz, 570 F. Supp. 351, 364 (D.N.J. 1983), aff'd, 770 F.2d 1070 (3d Cir. 1985), cert denied, 474 U.S. 1103 (1986). The facts are accepted as true and viewed in the light most favorable to the Plaintiff. See Cruz v. Beto, 405 U.S. 319, 322 (1972); Schrob v. Catterson, 948 F.2d 1402, 1405 (3d Cir. 1991). No claim is dismissed unless the Defendant demonstrates "beyond a doubt that the Plaintiff can prove no set of facts in support of [his or her] claim which would entitle [him or her] to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957). Pursuant to Fed. R. Civ. P. 12(b)(6), if on a motion to dismiss, a court is presented with matters outside of the pleadings, and the court chooses not to exclude such matters, "the motion should be treated as one for summary judgment and disposed of as provided by Rule 56". This Court shall treat this motion as a summary judgment motion because both parties have submitted matters outside of the pleadings.

Fed. R. Civ. P. 56(c) provides for summary judgment when the moving party demonstrates that there is no genuine issue as to a material fact and the evidence establishes the moving party's entitlement to judgment as a matter of law. See Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Orson, Inc. v. Miramax Film Corp., 79 F.3d 1358, 1366 (3d Cir. 1996). Once the moving party has satisfied its initial burden, the party opposing the motion must establish that a genuine issue as to a material fact exists. See Jersey Cent. Power & Light Co. v. Lacey Township, 772 F.2d 1103, 1109 (3d Cir. 1985). The party opposing the motion for summary judgment cannot rest on mere allegations and must instead present actual evidence that creates a genuine issue as to a material fact for trial. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 243 (1986); Siegel Transfer, Inc. v. Carrier Express, Inc., 54 F.3d 1125, 1130-31 (3d Cir. 1995). In determining whether there are any issues as to a material fact, the court must resolve all reasonable doubts as to the existence of a material fact against the moving party. See Smith

v. Pittsburgh Gage & Supply Co., 464 F.2d 870, 874 (3d Cir. 1972).

Gender Discrimination Claim

Plaintiff claims that she was discriminated against because she is female. Title VII states that it is unlawful for an employer to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex or national origin . . ." 42 U.S.C.A. 2000e-2(a) (West 1994). There are two ways to analyze gender discrimination cases. The first type or "direct evidence" analysis is applied when a Plaintiff offers "direct" evidence of unlawful discrimination, which is defined as "[e]vidence, which if believed, proves [the] existence of [the] fact in issue without inference or presumption." E.E.O.C. v. MCI Int'l., 829 F. Supp. 1438, 1447 (D.N.J. 1993). The second method of analysis, first explained in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973), is the "shifting burden" or "pretextual" analysis. If a Plaintiff is able to point to direct evidence of discrimination, the McDonnell Douglas shifting burdens analysis is inapplicable. See Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985); Gavalik v. Continental Can Co., 812 F.2d 834, 853 (3d Cir. 1987).

To sustain a claim for gender discrimination under the shifting burden analysis, a Plaintiff must first establish a prima facie case of discrimination. See Kachmar v. Sungard Data Systems, Inc., 109 F.3d 173, 182 (3d Cir. 1997); St. Mare's Honor Ctr. v. Hicks, 509 U.S. 502, 506 (1993). To establish a prima facie case of gender discrimination, a Plaintiff must prove that he or she: (1) is a member of a protected class; (2) applied for and was qualified for the position under dispute; (3) was rejected despite being qualified; and (4) others not in the protected class were treated differently. See McDonnell Douglas, 411 U.S. at 802-804; Fuentes v. Perskie, 32 F.3d 759, 763 (3d Cir. 1994); E.E.O.C., 829 F. Supp. at 1449. "Establishment of the prima facie case gives rise to a [rebuttable] presumption that the employer unlawfully discriminated against the applicant." Goodman v. London Metals Exchange, 86 N.J. 19, 31 (1981) (citing International Brotherhood of Teamsters v. United States, 431 U.S. 324, 358 (1977)).

If a Plaintiff succeeds in proving the prima facie case, the burden shifts to the Defendant-employer to articulate a legitimate, non-discriminatory reason for the adverse employment action. See Krouse v. American Sterilizer Co., 126 F.3d 494, 500 (3d Cir. 1997). The Defendant-employer's burden at this point is one of production, not persuasion, and therefore the Defendant-employer need only introduce evidence of "reasons for its actions which, if believed by the trier of fact, would support a finding that unlawful discrimination was not the cause of the employment action." St. Mary's Honor Ctr., 509 U.S. at 507. This burden is relatively light. See Krouse, 126 F.3d at 501.

If the Defendant-employer meets its burden, the burden shifts back to the Plaintiff to prove by a preponderance of the evidence that the Defendant's stated reasons were a pretext for discrimination, i.e., that the reasons were false *and* that discrimination was the real reason. See McDonnell Douglas, 411 U.S. at 802-804; Texas Dep't. Of Community Affairs v. Burdine, 450 U.S. 248, 252 (1981); Fuentes, 32 F.3d at 763. To show pretext sufficient to defeat a summary judgment, a Plaintiff must: (1) discredit the proffered reasons directly or circumstantially; or (2) adduce evidence that the discrimination was more likely than not a motivating or determinative cause of the adverse action. See Fuentes, 32 F.3d at 764. Thus, it is important to note that although the McDonnell Douglas analysis initially shifts the burden of production to the Defendant, "[t]he ultimate burden of persuading the trier of fact that the Defendant intentionally discriminated against the Plaintiff remains at all times with the Plaintiff." St. Mary's Honor Ctr., 509 U.S. at 507.

A Defendant is entitled to summary judgment if the Plaintiff fails to establish his or her prima facie case of discrimination by a preponderance of the evidence, or where the Plaintiff failed to produce sufficient evidence of pretext to rebut the Defendant-employer's assertion of a non-discriminatory reason for the adverse employment decision. See Jalil v. Avdel Corp., 873 F.2d 701, 707 (3d Cir. 1989). To discredit a Defendant-employer's proffered reason, the Plaintiff must prove that discriminatory animus motivated the action, not that the employer was wrong or mistaken. See Fuentes, 32 F.3d 759 at 765. The Plaintiff must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in

the Defendant-employer's proffered legitimate reasons that a reasonable fact-finder could rationally be unworthy of credence and infer that the employer did not act based on such reasons. See id. Thus, mere assertions or declarations of discriminatory motive are inadequate to preclude summary judgment.

Non-Selection Action

Plaintiff claims that in the fall of 1990, she was denied promotion to the position of AA/COS because of gender discrimination. Dr. Christopher Terrence gave the position to another man, John Popovitch. Defendant concedes that Plaintiff can establish a prima facie case of discrimination regarding this issue. Thus, the burden shifts to Defendant to articulate a legitimate, non-discriminatory reason for choosing Mr. Popovitch.

Defendant asserts that Dr. Terrence chose Mr. Popovitch for several non-discriminatory reasons, including: (1) he wanted to restructure the position[5]; (2) his direct experience with Plaintiff led him to believe that she did not possess the type of personality that he envisioned for the position, specifically, that she was not an adequately independent thinker with a "take charge" personality; (3) Mr. Popovitch was an experienced attorney who had independently administered the office of the Regional Counsel and had significant negotiating experience; (4) Mr. Popovitch had a fine reputation among the medical staff at the hospital; and (5) Mr. Popovitch had been deemed qualified by several other people.[6]

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[5]Dr. Terrence asserts that he wanted the new AA/COS to take full responsibility for many of the Chief of Staff's daily functions and administer them independently. Dr. Terrence felt that Mr. Manuel, Mr. Popovitch's predecessor, had been ineffective in this position. Dr. Terrence wanted to bring in an outsider who was not prone to the "we've always done it that way" mentality. In his testimony before the E.E.O.C., Dr. Terrence stated that he was looking for six basic skills/abilities: (1) develop relationships with University affiliates, including developing contracts, sharing agreements and other cooperative efforts; (2) deal independently with all services; (3) maintain confidentiality; (4) work with analytical methods; (5) deal with physicians, interpret VA regulations, etc.; and (6) manage COS office without day to day involvement of the COS.

[6]Several members of the Office of Personnel and Labor Relations, Management Placement Division evaluated all of the candidates recommended to

Additionally, Dr. Terrence had experience working with Plaintiff directly, in her capacity as a Patient Representative, as well as when she held the position of Acting AA/COS during the period between Mr. Manuel's retirement and Mr. Popovitch's appointment. Based on these experiences, Dr. Terrence felt that Mr. Popovitch better suited his needs. As Krouse requires, Defendant has successfully stated a legitimate non-discriminatory reason for the adverse employment action. Thus, the burden shifts to Plaintiff to prove that Defendant's stated reasons are a pretext for gender discrimination.

Plaintiff must demonstrate such weaknesses, implausibilities, inconsistencies, incoherences, or contradictions in the Defendant-employer's proffered reasons that a reasonable fact-finder could rationally find unworthy of credence and infer that the employer did not act based on such reasons. Fuentes, 32 F.3d at 765. Plaintiff's claims that Mr. Popovitch was "pre-selected based on gender" are not substantiated by the record. Plaintiff has not proffered any evidence which could reasonably bring Defendant's legitimate, non-discriminatory reasons into question.

First, Plaintiff has not proffered evidence which indicates that Mr. Popovitch was less qualified than she.[7] The record suggests, and this Court concludes, that both Plaintiff and Mr. Popovitch were generally qualified for the position and were both given due

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Dr. Terrence on the register. Regarding Mr. Popovitch, the members noted his: (1) oral and legal advice to the VA Medical Center; (2) service on the VA Medical Center ethics committee; (3) writing of opinions on Medical Center policy; (4) ten years experience as a medical technologist (lab); (5) extensive life science background (50 credits biology; 30 credits chemistry); (6) experience as a VA Adjudicator; and (7) prolific writing on medical issues.

[7]The Court would be persuaded by any credible evidence that Plaintiff was more qualified. None was proffered. By example, in E.E.O.C. v. L.B. Foster Company, 123 F.3d. 746 (3d Cir. 1997) the Plaintiff was able to prove that the legitimate, non-discriminatory reason cited by the Defendant was false. Id. at 752. The Plaintiff in that case clearly demonstrated that: (1) she had more management experience and broader job responsibilities than the man chosen for the position; and (2) the man chosen had performance problems in the past. Id. Plaintiff's arguments that Mr. Popovitch was ineligible for the position in the first place because he was categorized as "excepted service" and not "competitive service" is unsupported by the record and otherwise irrelevant to a determination of gender discrimination.

consideration. Given an employer's absolute right to choose a candidate based on non-discriminatory subjective standards, Dr. Terrence was certainly within his rights to choose Mr. Popovitch based on what he perceived to be professional and personality strengths which would enhance his performance in the position. The evidence suggests that he was free to choose any one of the candidates the Central Office recommended, including Mr. Popovitch or Plaintiff. As stated in Fuentes, the issue is not "whether the employer is wise, shrewd, prudent or competent" but rather "whether discriminatory animus motivated the employer." 32 F.3d at 765.

Second, Plaintiff has not provided any evidence which would lead any reasonable person to suspect that gender was a factor in Dr. Terrence's decision.[8] Plaintiff provides no evidence that indicates that gender was the basis for her non-selection, rather than other non-discriminatory factors. To the contrary, the record indicates that her non-selection was related to professional and personal qualifications, i.e., specifically related to Plaintiff's individual qualities and capabilities, rather than her gender. Plaintiff has failed to demonstrate such weakness and the record is devoid of any such credible evidence. Since there is no genuine issue as to a material fact, Defendant is entitled to summary judgment as a matter of law.

Appraisal Action

Plaintiff claims that her performance appraisal for the period April 1, 1990 through March 31, 1991, which rated her "Highly Successful", was an adverse employment action. Plaintiff argues that she should have been rated "Outstanding" for that period. As applied to this situation, to prove a prima facie case, Plaintiff would have to prove that she: (1) is a member of a protected class; (2) objectively deserved the "Outstanding" rating; (3) was given the "Highly Successful" rating versus the "Outstanding" rating, despite deserving the "Outstanding" rating; and (4) was treated differently

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[8]The record indicates that during his tenure, prior to his deposition in this matter, Dr. Terrence had promoted at least four women to significant positions in the hospital (some over male candidates). Specifically, he promoted women into the following positions - Chief of Dermatology, Chief of Social Work, Chief of Audiology and Speech Pathology and Chief of Nursing Services.

than those not in the protected class, i.e., other men similarly situated were or would have been given the "Outstanding" rating. Plaintiff does not establish her prima facie case for this claim.

First, this Court questions the premise that being rated "Highly Successful" rather than "Outstanding" qualifies as an adverse employment decision for the purposes of a federal employment discrimination claim. However, assuming arguendo that it satisfies the definition of "adverse", other than her bald assertions and subjective opinion, Plaintiff provides no evidence to establish that: (1) she actually deserved an "Outstanding" rating; (2) gender discrimination was the underlying reason that she received a rating of "Highly Successful" rather than "Outstanding"; or (3) that any male in the same circumstance had been or would have been treated differently. In fact, the "Highly Successful" rating was the same rating that she had earned on her last two appraisals. Interestingly, she does not claim discrimination regarding those appraisals.

Further, the record indicates that Dr. Terrence gave one or more other women "Outstanding" ratings.[9] The record lacks evidence indicating that males were treated preferentially or that any male employee got an "Outstanding" rating under circumstances similar to Plaintiff. In short, Plaintiff has failed to demonstrate any discriminatory conduct on the part of Dr. Terrence. There is no credible evidence in support of Plaintiff's claim that she received a "Highly Successful" appraisal rating instead of "Outstanding" because of gender discrimination. At most, the record suggests that Plaintiff and Dr. Terrence had a difference of opinion as to the measure of the work that she performed. Since there is no genuine issue as to a material fact, Defendant is entitled to summary judgment as a matter of law.

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[9]For example, the record includes an appraisal that Dr. Terrence gave to Lori Ellen Meyers for the period April 1, 1990 to March 31, 1991. This Court acknowledges that such evidence is not necessarily relevant to the issue of whether Dr. Terrence discriminated against Plaintiff individually. See e.g., E.E.O.C. v. J.B. Foster, 123 F.3d at 753 n.3; however, this Court determines that such evidence is certainly a factor to be considered

Retaliation Claim

Title VII prohibits an employer from taking retaliatory action against an employee for filing a discrimination claim. Specifically, Title VII states that "[i]t shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because [the employee] has opposed any practice made an unlawful employment practice by this subchapter" 42 U.S.C.A. § 2000e-3(a) (West 1998). To establish a prima facie case of retaliation, a Plaintiff must show that: (1) he or she was engaged in statutorily protected activity; (2) he or she was subjected to an adverse employment decision; and (3) there was a causal link between the protected conduct and the adverse employment action. See Krouse v. American Sterilizer Co., 126 F.3d 494, 500 (3d Cir. 1997); Charlton v. Paramus Bd. of Ed., 25 F.3d 194, 201 (3d Cir. 1994); Poveromo-Spring v. Exxon Corp., 968 F. Supp. 219, 226 (D.N.J. 1997). As the Kachmar court noted, temporal proximity can provide the evidentiary basis from which an inference of causation can be drawn; however, if there is a lack of temporal proximity, circumstantial evidence of a pattern of antagonism following the protected conduct can give rise to an inference that the employee's protected activity was a likely reason for the adverse action. 109 F.3d at 178.

Non-Selection Action

Plaintiff claims that Dr. Terrence, her immediate supervisor, retaliated against her by denying her a promotion to the position of AA/COS because knew of her prior E.E.O.C. complaints against the hospital. Plaintiff meets the first two prongs of the requisite prima facie case; however, she fails to satisfy the third prong. Plaintiff has not established a causal link between the filing of her E.E.O.C. claims and Dr. Terrence's selection of Mr. Popovitch as the new AA/COS. First, there is no evidence that Dr. Terrence ever knew about her previous E.E.O.C. actions and he denies such knowledge. Although she assumes his knowledge in her responsive papers and oral argument, her assertion is one of "he must have known" versus a reasonable basis to believe that he knew. Second, even if he had known about the previous E.E.O.C. complaints, he was not personally involved in those actions. Indeed, of the actions complained of, most occurred before he arrived at the VA Medical Center; thus he

had no direct interest in retaliating against her.[10] Third, there is no evidence that even if Dr. Terrence had known of the prior complaints, his hiring of Mr. Popovitch was at all related to those previously filed E.E.O.C. complaints. For example, there is nothing in the record to indicate that he expressed to Plaintiff or anyone his negative regard of those actions. The record is simply devoid of evidence which could reasonably establish a causal link between Dr. Terrence's action and her previous E.E.O.C. complaints. Thus, there is no genuine issue as to a material fact and Defendant is entitled to summary judgment as a matter of law.

Appraisal Action

Plaintiff claims that her performance appraisal for the period April 1, 1990 through March 31, 1991, which rated her "Highly Successful", was an adverse employment action because she should have been rated "Outstanding" for that period. This Court finds that Plaintiff fails both the second and the third prong of the prima facie case for retaliation. First, this Court does not consider being rated as "Highly Successful" versus "Outstanding" to be an adverse employment decision by any objective standards. As stated by the Third Circuit in Robinson v. City of Pittsburgh, 120 F.3d 1286, 1300 (3d Cir. 1997)(citing Smart v. Ball State Univ., 89 F.3d 437, 441 (7th Cir. 1996)):

> Retaliatory conduct other than discharge or refusal to rehire is thus proscribed by Title VII only if it alters the employee's "compensation, terms, conditions or privileges of employment," deprives him or her of "employment opportunities," or "adversely affect[s] his [or her] status as an employee." It follows that "not everything that makes an employee unhappy" qualifies as retaliation, or [o]therwise, minor and even trivial employment actions that 'an irritable, chip-on-the shoulder employee did not like would form the basis of a discrimination suit.'"

[10]Also, the record indicates that Dr. Terrence gave Plaintiff several cash awards based on performance during the relevant period.

This Court finds that the employment decision at issue here is of the kind which the Third Circuit hoped to exclude from Title VII litigation. It is clear that Plaintiff would have rather had an "Outstanding" appraisal rating, but there is simply no evidence that a lower rating was given in retaliation for the filing of her claims. Thus, there is no genuine issue as to a material fact and Defendant is entitled to summary judgment as a matter of law.

CONCLUSION

Based on the reasoning set forth above, Defendant's motion for summary judgment on Plaintiff's two complaints (case nos. 96-4822 and 97-1311) shall be granted.

/s/
JOSEPH A. GREENAWAY, JR., U.S.D.J.

Dated: October 5th, 1998